Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
	)	
1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	**CC Docket No. 98-171**
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	**CC Docket No. 90-571**
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	**CC Docket No. 92-237** **NSD File No. L-00-72**
	)	
Number Resource Optimization	)	**CC Docket No. 99-200**
	)	
Telephone Number Portability	)	**CC Docket No. 95-116**
	)	
Truth-in-Billing and Billing Format	)	**CC Docket No. 98-170**

To: The Commission

<u>REPLY COMMENTS</u>

WebLink Wireless, Inc. ("WebLink"), by its attorneys, hereby submits its Reply Comments in the <u>Further Notice of Proposed Rulemaking</u> ("FNPRM") adopted by the Federal Communications Commission (the "FCC" or "Commission") on February 14, 2002 in the above-captioned proceeding, in connection with the reform of the revenue based contribution mechanism of the Universal Service Fee ("USF") program.[1]

The following is respectfully shown:

I.

INTRODUCTION

WebLink is a nationwide messaging carrier located in Dallas, Texas. It is a leader in the wireless data industry, providing wireless email, wireless messaging, information on demand and traditional paging services through-out the United States.

WebLink participated in the 2001 Notice phase of this proceeding as a member of PCIA.[2] Although WebLink agrees that the present revenue based system may need some modification with respect to adding more participants to increase USF funding, as well as alternative approaches to the use of historical revenues as a base for the assessment, WebLink submits that the Commission should not abandon the existing revenue based contribution system. Accordingly, WebLink, by these Reply Comments,

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1 Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing Format, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Further Notice of Proposed Rulemaking, FCC 02-43, released February 26, 2002 ("FNPRM".)

2 Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, Notice of Proposed Rulemaking, 16 FCC Rcd 9892 (2001) (2001 Notice).

joins the majority of Commenters in this processing in opposition to the Commission's proposal for a per-connection based USF mechanism.

II.

THE PROPOSED ASSESSMENT MECHANISM VIOLATES SECTION 254(d)

A. The Per-Connection Based Mechanism Is Inequitable And Discriminatory

With respect to the Commission's request for comments on whether a connection-based assessment satisfies each element of the requirement in Section 254(d) of the Communications Act of 1934, as amended, 47 U.S.C. §254(d), that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service," [3] WebLink concurs with the views of Allied Personal Communications Industry Association of California ("Allied") and with Arch Wireless, Inc. ("Arch"). Both Commenters maintain that the proposal violates at least two elements of Section 254(d).[4]

Allied stresses that a connection-based assessment violates Section 254(d), which requires that any assessment must be equitable and non-discriminatory, because a connection-based assessment is not competitively neutral. It is not neutral because "the unit of measurement [the connection]…is inherently unequal."[5] As an example, Allied states that some cellular carriers bundle cellular services, SMS and paging services in one

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3 FNPRM at ¶65.

4 Indeed, many opposing commenters, which constitute the majority of those commenting, assert that a per-connection assessment would violate 47 U.S.C. 47 U.S.C. §254(d).

5 Allied at 5.

connection, which competes with carriers who only provide paging services with a connection

To illustrate further this lack of competitive neutrality, Arch points out that there are disparities among the revenues generated by per-connection for different types of carriers and services.[6] Other disparities could include the amount of time consumed on the public switched telephone network ("PSTN") by the connection which would reap more benefit to the carrier; [7] the revenue generated from the connection; and the bundling of several services into one connection. Thus, even though the effort is to move away from a revenue based assessment, the necessity remains to include it, since it is that factor that determines what is equitable.[8]

The per-connection proposal is particularly discriminatory to the paging carrier. As Allied states at 4, this proposal would impose a 257% increase in paging carriers' USF burden, essentially pushing the safe harbor provision for interstate revenues for paging carriers from 12% to 43%. Moreover, Arch adds at 10, that the present safe harbor percentage was based on actual paging carrier data and since paging carriers do not offer long distance services, do not bundle their service with any other offerings and have not seen interstate paging revenues rise, this safe harbor percentage should not change. (It is important to note here that paging revenues in general have fallen.) [9] Furthermore, Allied asserts that under the Commission's per-connection proposal, cellular carriers have

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6 Arch at 4.

7 See Commission discussion on these benefits, FNPRM at ¶43

8 See Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 434-435 (5th Cir. 1999)

9 In re Implementation of Section 6006(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competition Market Conditions With Respect to Commercial Mobile Services, Sixth Report, 16 FCC Rcd 13350 (2001)("Sixth Report")

a 117% increase in USF burden and ILECs/IXCs will have a decrease by 22%. This increase to paging carriers, alone and in comparison to cellular carriers and LECs/IXCs, is enormous since based on FCC documentation,[10] paging carriers' average revenue per unit is approximately $8, while the average bill for a landline connection is $53. Thus, paging customers would pay USF 3.1% on average versus a landline customer who would pay 1.9% on average. Presently, paging carriers currently pay $0.07 per pager to the USF and $0.25 would be a 300% increase. These figures reveal the extraordinary discriminatory effect of the Commission's per-connection plan on paging carriers, particularly in light of the limited usage – due to short message transmissions and no continuous interaction -- of the PSTN by paging customers.

Finally, both Allied and Arch discuss the fact that, unlike other carrier groups, paging carriers are not eligible to draw from the USF. WebLink submits that this emphasizes the inequitable and discriminatory character of any increased USF assessment on paging carriers.

B. The Per-Connection Based Mechanism Will Illegally Assess Intrastate Paging Services.

WebLink agrees with Allied, at 6, that a connection-based assessment bears no relation to interstate revenues and is in contravention of the statute.[11] Section §254(d) requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute…" WebLink is not aware of any method to differentiate between interstate and intrastate traffic in a per-connection scenario. Thus,

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10 Arch at 9, citing In re Implementation of Section 6006(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competition Market Conditions With Respect to Commercial Mobile Services, Fifth Report, 15 FCC Rcd 17660, 17774 (2000).

11 Allied at 6.

given that there appears no way of determining whether a particular connection has an interstate component, that element of 47 U.S.C. §254(d) will be violated. [12] USF contributions must, by Commission Rule §54.706(b) and by case precedent, be derived only from interstate telecommunications services.

In the FNPRM at ¶12, the Commission, while discussing the current state of mobile telephone service with long distance calling plans, states "The availability of such plans compounds the inherent difficulty of identifying interstate revenues in a mobile environment." Nevertheless, the U.S. Court of Appeals for the Fifth Circuit held that the Act prohibits the inclusion of revenues other than interstate services in the calculation of universal service contributions and that further, any payment required by the FCC that is not based on interstate services, is "arbitrary and capricious and manifestly contrary to the statute," Texas Office of Public Utility Counsel v. FCC, at 434-435, citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

Thus, despite the difficulty of identifying interstate revenues, the statute and case precedent require that USF payments must come from a revenue based assessment system.

III.

THIS PROPOSAL DEPARTS FROM COMMISSION POLICY WITHOUT ADEQUATE EXPLANATION

Through-out the USF proceedings below, the Commission has been steadfastly opposed to a flat rate assessment as administratively burdensome, discriminatory and not

[12] Id.

competitively neutral.[13] In fact, the Commission has consistently stated that a flat-rate assessment may "favor certain services or service providers over others."[14] As Arch points out, the Commission has declined to adopt such a flat-rate assessment on various other occasions beginning in 1996. Now, it has apparently shifted its position without: proper justification; adequate discussion on how this shift can be explained in the light of the statute; and proper data justifying its new position. Instead, the Commission relies on and defers to an industry group's proposed assessment amounts.[15] Nevertheless, a reasoned justification is required by the Administrative Procedures Act. Since the Commission does not adequately explain its rationale for shifting its policy position and from past precedent, WebLink agrees with Arch that the Commission's acceptance of the USF Coalition's and Sprint's proposed per-connection assessments, without any supporting data, would be arbitrary and capricious decision-making. The Commission proposes a per-connection mechanism that at best is based on speculative rationale. This is not reasoned decision-making.[16]

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13 *Arch at 2-3.*

14 *Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order stablishing Joint Board, 11 FCC Rcd 18092, 18147-48, ¶ 124 (1996)*

15 *Arch at 8.*

16 *See United States Telecom Association, et al. v. Federal Communications Commission, 227 F.3d 450, 461 (D.C. Cir. (2000). ("Fundamental principles of administrative law require that agency action be 'based on a consideration of the relevant factors,' Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971),… and rest on reasoned decision-making in which 'the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).*

IV.

THE PAGING INDUSTRY
 CANNOT SUPPORT ADDITIONAL BURDENS

Both Allied and Arch comment on the tenuous state of the paging industry. This is a well-known fact. As the Commission noted in its Sixth Report at 13402-13404, the subscribership and revenues in the paging/messaging industry have declined, with the number of one-way subscribers falling 2.2% in 2000 alone. In addition, all except one of the top five paging companies have filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§101 et seq since January 1, 2000.[17] Another paging company was liquidated under Chapter 7.

Although these USF assessment may be passed through to the end user, paging has become so competitive that any movement on price could cause customer churn. Thus, paging providers are either required to make the payments themselves to satisfy their customers or pass these costs on, at the risk of losing yet another customer. To make matters worse, this is not the only proceeding that proposes increased payments by paging carriers despite their declining revenues and subscribership.[18]

It is clear then that the paging industry – and their customers -- simply cannot afford any additional costs associated with regulatory decisions. The Commission is obligated to consider such industry disruptions in its regulatory actions. See, for

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17 WebLink Wireless Inc. filed for Chapter 11 bankruptcy May 23, 2002 in the Northern District of Texas, Dallas Division, Case Nos. 01-34275-SAF-11, 01-34277-SAF-11, 01-34279-SAF-11.

18 In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2002, FCC 02-92, Notice of Proposed Rulemaking, released March 27, 2002, the Commission proposed a payment raise in the regulatory fees from $0.05 per unit to $0.08, a 60% increase.

example, First Report and Order, Access Charge Reform.[19] See also, National Ass'n of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095, 1136 (D.C. Cir. 1984), cert denied 469 U.S. 1227 (1985) (upholding exemption "to avoid unnecessary customer impact or market displacement.")

Nevertheless, should the Commission decide to adopt a connection-based assessment system, WebLink agrees with Arch [20] that it should not adopt a per-unit charge for paging carriers that is any higher than the current average of $0.07. However, WebLink often has some paging units that are "dormant", i.e., they are connected to WebLink's network, but are not in use. For that reason, WebLink is unable to bill these customers and accordingly, it does not receive revenues from them. Therefore, should the Commission adopt the per-connection system, WebLink requests that the Commission not require paging carriers to report "dormant" units.

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[19] First Report and Order, Access Charge Reform 12 FCC Rcd 15985, 16002 (1997).

[20] Arch at 2.

V.

CONCLUSION

WHEREFORE, the foregoing having been duly considered, WebLink Wireless, Inc. respectfully submits that the Commission should not adopt a per-connection assessment mechanism.

Respectfully submitted,

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